

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1905.

Nos. 381, 382, 383, 384.

LEWIS M. ALEXANDER et al., *Appellants*,

vs.

THE UNITED STATES.

No. 385.

E. T. HARMON et al., *Appellants*,

vs.

THE UNITED STATES.

Nos. 490, 491, 492.

BENJAMIN F. NELSON et al., *Plaintiffs in Error*,

vs.

THE UNITED STATES.

**Statement of Facts and Points on Behalf of
Appellants.**

The principal proceeding, out of which all of these cases arise, was commenced by a petition filed by the United States in the Circuit court for the district of Minnesota. In that case, the United States was complainant and the General Paper Company and about twenty-three companies, which owned and operated mills for the manufacture of paper, were made parties defendant. The

Manufacturers Paper Company was also made a party defendant, but as to it, the petition was subsequently dismissed on motion of the complainant.

The appellants Alexander, Whiting and Stuart were and (other than Stuart) are officers of the General Paper Company; Alexander being its secretary, Whiting its first vice-president and Stuart its second vice-president and general manager. Alexander was and is also president of the John Edwards Manufacturing Company and Whiting was and is president of the Wisconsin River Paper & Pulp Company.

The appellant Harmon was and is a director of the General Paper Company; president and manager of the Grand Rapids Pulp & Paper Company, and a stockholder in the Centralia Pulp and Water Power Company.

The plaintiff in error Nelson was and is a director of the General Paper Company and the president of and a director in the Hennepin Paper Company. The plaintiff in error Barsard was and is a director in and the manager and treasurer of the Itasca Paper Company. The plaintiff in error McNair was and is a director in and the general manager of the Northwest Paper Company.

All of the companies with which the various appellants and plaintiffs in error are connected, are made parties defendant to the petition above mentioned.

By this petition, which is the foundation of the subsequent proceedings out of which these appeals and writs of error arise, it was charged by the United States that the General Paper Company, together with the other corporations referred to, was guilty of conspiracy in violation of the so-called Sherman or Anti-trust Act of 1890.

The petition charged that each of the several corpora-

tions named therein was engaged in manufacturing news print, manilla, fibre and other papers in the states of Wisconsin, Minnesota and Michigan, prior to the month of May in the year 1900, and in selling and shipping the products of their mills to dealers, newspapers and other customers in divers states of the Union; that the defendant companies, at that time, comprised substantially all of the manufacturers of paper in the territory referred to.

That in or about the month of May, 1900, certain of the defendant companies, in violation of the Act of 1890, entered into an agreement, combination and conspiracy with each other to restrain trade and commerce and control, regulate and monopolize said trade, and in conjunction and alliance with other defendants who subsequently joined in such agreement, combination and conspiracy, do now control, regulate, monopolize and restrain the trade and commerce, not only in the manufacture of news print, manilla, fibre and other papers, but also in the distribution, sale and shipment thereof among and throughout the states of the Union and all states west of the Mississippi River, by means of, and in the following manner, to wit:

That on or about the 20th day of May, 1900, said defendants caused to be organized under the laws of the state of Wisconsin a corporation styled the General Paper Company, with a capital stock of one hundred thousand dollars (\$100,000) divided into one thousand shares, which were distributed among and are now owned by the other defendants in the suit, in proportion to their average daily output; which corporation is, by its articles of incorporation, authorized to become, as its principal business, the sales agent of any and all kinds of paper

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and paper products, and any and all merchandise manufactured from paper or paper products by mills in Wisconsin and elsewhere; that in pursuance of a common plan and understanding, each of the defendants entered into a contract and agreement with the General Paper Company, making it the exclusive selling agent of their papers and paper products, conferring upon it absolute power to control and restrict the output of their mills, fix the price of all paper sold throughout the states aforesaid and determine to whom, and the terms and conditions upon which, paper shall be sold and into what states and places it shall be shipped and what publishers and other customers each mill shall supply; that thereafter, other companies, also made defendants to said petition, joined in said agreement, combination and conspiracy.

That by virtue, and through the instrumentality of the agreement, combination and conspiracy described, all competition in the manufacture, sale and distribution of news print, manilla, fibre and other papers in the states described, and in all states west of the Mississippi River, has been suppressed and the price of all paper products greatly increased.

The petition prays for a decree that the alleged combination or conspiracy described therein is unlawful and in derogation of the common rights of the people and in violation of the Act of 1890; and that the defendants, and each of them, their officers, directors, stockholders, agents and servants be perpetually enjoined from doing any act for the purpose of carrying out the same and particularly that the General Paper Company be enjoined from acting as sales agent, and fixing the price at which paper of the other defendants shall be sold and determining to whom it shall be sold, and that each of the

other defendants be enjoined and restrained from continuing said arrangement with the General Paper Company, and from making it the exclusive sales agent of their products. (printed record in 381, p. 15, *et seq.*)

All of the defendants, except the Rhinelander Paper Company, joined in an answer to this petition (and, subsequently, the Rhinelander Paper Company filed a separate answer).

The answer admits that prior to the month of May, 1900, the defendants were competing with each other in the sale and shipment of news print, manilla, fibre and other paper throughout the territory mentioned in the petition and alleges that they have ever since continued to so compete and are now so competing. The defendants deny that they comprise substantially all of the manufacturers of paper in the territory described in the petition, but on the contrary allege that there are now and have been, since prior to the year 1900, a number of other manufacturers of paper in said territory, competing with each other and with the defendants named in said bill.

They deny that they or any of them at any time entered into any agreement, combination or conspiracy with each other, or with any person or corporation whatever, to restrain the trade or commerce among the several states, or among any states whatever, or within any state whatever, or to control or monopolize said trade or commerce, and deny that they have ever, at any time, made, formed or entered into any agreement, combination or conspiracy, and deny that they or any of them do now control, monopolize or restrain the trade and commerce between any states whatever or within any state, either in the manufacture of news print, manilla, fibre or other paper, or in

the distribution, sale or shipment thereof among or throughout the states of the Union, or any states whatever, or within the limits or borders of any state whatever.

They admit that on or about the 26th day of May, 1900, the General Paper Company was organized under the laws of the state of Wisconsin, with a capital stock of \$100,000, divided into 1,000 shares, which corporation, by its articles of incorporation, was authorized to become the sales agent for any and all kinds of paper and paper products, and any and all merchandise manufactured from paper or paper products.

It is admitted by the answer that thereafter each of the defendants entered into a contract with the General Paper Company, constituting the latter its exclusive selling agent for a definite period, specified in such contract, to sell certain specified grades or descriptions of paper manufactured by the other party to such contract.

But it is denied that any defendant, by such contract or otherwise, ever conferred upon the General Paper Company the power to control or restrict the output of the defendants' mills so contracting, or to fix the price of all, or any, paper sold throughout the states aforesaid, or to determine to whom or upon what prices or conditions the paper manufactured by such mills should be sold, or into what states or places it should be shipped or what publishers or other customers each mill should supply.

The defendant alleges that under such contracts, it was made the duty of the General Paper Company to use its best efforts to keep the mill or mills owned or controlled by the other party to each of such contracts supplied with orders for paper at the best prices reasonably obtainable, and to submit all orders so obtained to the

mill for which the same was taken, for its approval or rejection, and to transmit all orders received by or offered to it for a particular mill to the mill selected by the customer for the approval or rejection of such mill, to the end that each of such mills might be supplied with orders to the full extent of its capacity and the demands of the trade supplied, in the most prompt and efficient manner possible. (printed record in 381, p. 22, *et seq.*)

The Rhinelander Paper Company by its separate answer also denies any agreement, combination or conspiracy between it and any of the other defendants to the bill to restrain trade or commerce among the several states, or to control, regulate or monopolize trade or commerce therein.

It denies that the defendants, or any or either of them, conferred any power upon the General Paper Company to control or restrict the output of its mills; denies that the General Paper Company is authorized to fix the price at which paper is to be sold, or that the General Paper Company has the right to determine to whom and upon what terms and conditions its paper shall be sold, or into what states it shall be shipped, or to whom it shall be shipped; and alleges and avers that while it is the business of the General Paper Company to solicit orders for paper and make sales thereof, and obtain reasonable prices therefor, all orders taken by the General Paper Company for said defendants are subject to its approval, and it has the right to reject the same for inadequacy of price, or lack of sufficient standing on the part of the purchaser, or for any other good or sufficient reason. (printed record in 381, p. 30.)

A general replication was filed on all of the answers, and subsequently an order was entered appointing Robert

S. Taylor special examiner with power and authority according to the rules and practice in such cases made and provided, to hold hearings and receive testimony in behalf of either party at such times and places, within or without the district of Minnesota, as he may designate and appoint.

Up to this point the proceedings so far as they affect the several appellants and plaintiffs in error are alike as to each, but from this point forward the proceedings out of which these appeals and writs of error arise differ and may be divided into three groups, as follows:

First. The proceedings out of which the appeals of Alexander, Whiting, Stuart and the General Paper Company, being Nos. 381, 382, 383 and 384, respectively, arise.

Second. The proceedings out of which the appeal of Harmon and of the General Paper Company, being No. 385, arises.

Third. The proceedings to review which the writs of error of Nelson, Bossard and McNair, being Nos. 490, 491 and 492, respectively, were sued out.

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As to group one the proceedings were as follows:

The special examiner appointed a hearing before him in the city of Milwaukee in the Eastern District of Wisconsin, and thereupon the United States on the 4th day of May, 1905, filed its petition in the Circuit court of said Eastern District of Wisconsin praying for writs of *subpoena duces tecum* requiring the appellants Alexander, Whiting, Stuart and others to appear before said examiner and produce certain books and papers.

This petition after briefly setting forth the issues in the

case, the appointment of such special examiner and the designation by him of the time and place in the city of Milwaukee for the taking of testimony, states:

"Fourth. Your petitioner further states that in order fully to determine the nature and effect of such combination and conspiracy referred to in the petition, and satisfactorily and by competent and material evidence to establish the truth of the averments of said petition in that regard, it is proper, material and necessary to have summoned before the said special examiner at the hearing above mentioned, the following witnesses, and to have produced in evidence and laid before the court for its inspection, the various papers, books and documents hereinafter particularly described, in the possession and under the control of said witnesses respectively." (printed record in 381, pages 2 and 3.)

This is the only allegation in the petition respecting the existence of the papers, books and documents called for, or of the nature of their contents, or having the slightest tendency to show that they contained entries material to the issues.

The petition then prays for writs of *subpoena duces tecum* directed to appellants Alexander, Whiting, Stuart and others and requiring them to attend before the special examiner on May 16, 1905, to give evidence and to bring with them the following books and papers, viz.:

"All written contracts or agreements made and entered into by and between the above named defendant General Paper Company, and any or all of the other above named defendants in said cause, between the 1st day of May, 1900, and the present time, showing or in any way tending to show the terms and conditions upon which the said defendant General Paper Company sells or controls, or in any way deals

in or has sold or controlled, or in any way dealt in, the product of the said other defendants or each or any of them, between the said 1st day of May, 1900, and the present time.

"All stock books, stock ledgers and any and all other books of the said General Paper Company showing the ownership and distribution of the stock of said General Paper Company, from the time of its organization to the present time; and also all books or papers showing the manner and proportions in which the earnings of said defendant General Paper Company have from the time of its organization to the present time been divided and distributed.

"Any and all books, written agreements or papers relating to or in any way bearing upon the control of the defendant General Paper Company, from the time of its organization to the present time, over the output of any or all of the other above named defendants, whether said control consists or has consisted in restrictions upon the quantity of paper of any kind or description produced or to be produced, or in designating the style, brand or quality of paper produced or to be produced by the said other defendants or any of them.

"Any and all books, papers, documents and correspondence in the possession or under control of the said witnesses, either individually or *as officers of the defendant* General Paper Company, relating to the manufacture of that certain grade of paper known as butcher's fibre, and particularly correspondence between the defendant General Paper Company and E. A. Edmonds, formerly of the Falls Manufacturing Company, Oconto Falls, Wisconsin, and now of the Rhinelander Paper Company, Rhinelander, Wisconsin, bearing upon the manufacture and sale of, and the distribution and apportionment of losses arising from the manufacture and sale of, butcher's fibre.

"Any and all correspondence—letterpress copies,

if any, of correspondence sent, as well as original letters or papers received—between the said defendant General Paper Company, and each and all of the other defendants, showing the terms and conditions upon and under which the said defendant General Paper Company has from the time of its organization to the present time sold or disposed of, and does sell or dispose of, the product of the said other defendants; it being not intended hereby to require the production of business communications passing between the parties in the ordinary course of buying and selling, such as letters merely enclosing remittances, making quotations of prices, or directing shipments to be made." (printed record in 381 pp. 3-4.)

Thereupon an *ex parte* order was entered directing *subpoenas* to issue as prayed in the petition. (pr. rec., 34.)

Afterward, on May 12, 1905, the United States filed an additional petition, which, after reciting the issues in the cause and the appointment of the examiner, contained the following:

"Fourth. Your petitioner further states that in order fully to determine the nature and effect of said combination and conspiracy referred to in the petition, and satisfactorily and by competent and material evidence to establish the truth of the averments of said petition in that regard, it is proper, material and necessary to have summoned before the said special examiner at the hearing above mentioned, the following witnesses, and to have produced in evidence and laid before the court for its inspection, the various papers, books and documents hereinafter particularly mentioned, in the possession and under the control of said witnesses respectively; and in this connection your petitioner avers that the

above named defendant General Paper Company has, between the first day of May, 1900, and the present time, from time to time made and entered into certain contracts with the publishers of nearly all of the leading newspapers in the middle and western states for the furnishing by said General Paper Company, upon the terms and conditions in said contracts stated, to the said publishers, of news print or roll print paper required by the said publishers in the publication of their respective newspapers; that the said contracts were all executed in duplicate, and one copy of each thereof duly executed by the respective parties thereto was retained by, and is now in the possession of the said defendant General Paper Company; that the said contracts are competent and material evidence bearing upon the issues in the said cause.

"Wherefore, your petitioner respectfully prays that an order may issue, directing the clerk of the Circuit court of the United States for the Eastern District of Wisconsin to issue under the seal of said court, and to sign and attest, *subpoenas duces tecum* as follows:

"To L. M. Alexander, individually and as secretary and treasurer of General Paper Company, residing at Milwaukee, Wisconsin; and to

"John A. Davis, individually and as general sales manager of General Paper Company, residing at Chicago, Illinois, directing them and each of them, to be and attend before Robert S. Taylor, special examiner of the United States Circuit court for the district of Minnesota at United States commissioner's room, 314 Federal building, in the city of Milwaukee, and state of Wisconsin, at ten o'clock in the forenoon of the 16th day of May, 1905, then and there to be examined and to give evidence on the part of the petitioner in the above cause, and directing them, and each of them, to bring with them

and produce at the time and place aforesaid, the following papers and documents, to wit:

"All written contracts or agreements made and entered into between the first day of May, 1900, and the present time, by and between the above named defendant General Paper Company, and any and all publishers of newspapers in the following named cities for the furnishing by said General Paper Company of roll print or news print paper to said publishers:

Milwaukee, Wisconsin,
Oshkosh, Wisconsin,
St. Paul, Minnesota,
Minneapolis, Minnesota,
Duluth, Minnesota,
Des Moines, Iowa,
Dubuque, Iowa,
Sioux City, Iowa,
Omaha, Nebraska,
Kansas City, Missouri,
St. Louis, Missouri,
Chicago, Illinois,
New Orleans, Louisiana,
Denver, Colorado,
Salt Lake City, Utah." (pr. rec., 36, 37.)

Thereupon, on May 12, 1905, an *ex parte* order was entered directing subpoenas to issue as prayed in said petition.

Both of said petitions for *subpoenas duces tecum* were filed *ex parte* and no notice given to any one, and neither of them was supported by affidavits or other evidence (except affidavit shown on page 34), nor is either signed by the Attorney General.

The witnesses attended in obedience to these *subpoenas*, but refused to throw open to the inspection of counsel for the government the books, records and papers of the

General Paper Company, called for in the *subpoenas*, or to permit them to be given in evidence in the absence of a more specific showing that they contained evidence proper to be given and material to the issue.

Afterward, on June 1, 1905, the United States filed in said Circuit court for the Eastern District of Wisconsin a petition for an order requiring the witnesses Alexander, Whiting and Stuart to show cause why they should not answer the questions propounded to them and produce the books, records, papers, reports and contracts and comply with the requests referred to.

This petition, after reciting the issue in the cause, the appointment of the special examiner, the hearing before him on May 16, and the appearance at said hearing of Alexander, Whiting, Stuart and other witnesses, recites as follows:

"That the first witness called for examination by counsel for the petitioner was L. M. Alexander, secretary and treasurer of the defendant General Paper Company, president of the defendant The John Edwards Manufacturing Company, secretary and treasurer of the defendant The Nekoosa Paper Company, and secretary of the defendant Centralia Pulp and Water Power Company; that in the course of his examination by counsel for the petitioner the said Alexander did, contrary to law and to the practice of this court, refuse to answer certain questions put to him, and to comply with certain requests made upon him, such refusals on the part of said Alexander being particularly set forth in the schedule of refusals on the part of said witness Alexander hereto attached, referred to and made a part hereof.

"That the second witness called for examination by counsel for the petitioner was George A. Whiting, first vice-president of the defendant General Paper Company, and president of defendant The

Wisconsin River Paper and Pulp Company; that in the course of his examination by counsel for the petitioner the said Whiting did, contrary to law and to the practice of this court, refuse to answer certain questions put to him, and to comply with certain requests made upon him, such refusals on the part of said Whiting being particularly set forth in the schedule of refusals on the part of said witness Whiting hereto attached, referred to and made a part hereof.

"That the third witness called for examination by counsel for the petitioner was W. Z. Stuart, second vice-president of the defendant General Paper Company; that in the course of his examination by counsel for the petitioner the said Stuart did, contrary to law and to the practice of this court, refuse to answer certain questions put to him, and to comply with certain requests made upon him, such refusals on the part of said Stuart being particularly set forth in the schedule of refusals on the part of said witness W. Z. Stuart, hereto attached, referred to and made a part hereof.

"That all of the questions which the said witnesses L. M. Alexander, George A. Whiting and W. Z. Stuart have refused and do still refuse to answer are, as your petitioner verily believes, perfectly proper, competent and material to be answered, and all of the requests above referred to which the said witnesses Alexander, Whiting and Stuart have refused and do still refuse to comply with are, as your petitioner verily believes, perfectly proper to be complied with in order that all of the material facts relating to the charge set out in the bill of complaint or petition may fully appear and be laid before the court for the proper determination of said cause." (pr. rec. in 381, pp. 43, 44.)

This petition is sworn to by Frank B. Kellogg, one of the solicitors for the complainant.

Upon the filing of this petition an order was entered that the witnesses Alexander, Whiting and Stuart appear before the court on the sixth day of June to show cause why they should not answer the questions referred to, and comply with the requests mentioned in the petition, and produce for the purpose of their examination and inspection by counsel for the petitioner, and for the purpose of being offered in evidence, the books, records, papers, reports and contracts particularly referred to in the petition and schedule. (pr. rec., p. 54.)

To this petition answers were filed by the appellants Alexander, Whiting and Stuart, and also, by leave of court, an answer was filed by the General Paper Company. As these answers present practically the same defense, it will be sufficient to refer briefly to that of the appellant Alexander, which states that he is the secretary of the General Paper Company, and as such secretary, and not otherwise, is one of the custodians of the books, records, papers, reports and contracts mentioned in the order to show cause and in the petition and schedules attached thereto upon which such order was made, and that the same are the books, records, papers, reports and contracts of the General Paper Company, and not of this respondent, and are subject to the control of the General Paper Company, and not of this respondent; that he is also the president of the John Edwards Manufacturing Company, one of the defendants, and is the owner and holder of stock in said company of the par value of six thousand dollars (\$6,000); that he is also the secretary and treasurer of the Nekoosa Paper Company, another of said defendants, and the owner and holder of stock in said company at the par value of forty thousand dollars (\$40,000); that he is the secretary of the Cen-

tralia Pulp and Water Power Company, another of said defendants, and the owner and holder of stock of said company of the par value of twenty-five thousand dollars (\$25,000); that he is the owner and holder of stock in the General Paper Company of the par value of six thousand dollars (\$6,000); that said General Paper Company, John Edwards Manufacturing Company, Nekoosa Paper Company and Centralia Pulp and Water Power Company have objected and do object, and respondent has objected and does object, to the production of said books, records, papers, reports and contracts to be inspected by counsel for the complainant for the purpose of being offered in evidence; that said objections are based upon the following reasons:

First. The materiality of said books, records, papers, reports and contracts has not been established so as to authorize a court of equity to order their inspection, production and introduction in evidence and that the same are not material, relevant or competent evidence in said cause; that said books, records, papers, reports and contracts contain matters of importance relating to the business of the General Paper Company and other defendants above named in no way bearing upon or touching the issues in this cause; that it would be highly injurious to the business interests of the General Paper Company and other defendants to make public said books, records, papers, reports and contracts, except on a proper showing that the same are material to establish some issue in this cause and that the same are not privileged for the protection of said defendant.

Second. That one of the purposes of the complainant in filing said suit and in making the requests in said suit is to compel the General Paper Company and other

defendants to furnish evidence tending to establish that the General Paper Company and other defendants have been guilty of violation of the Act of Congress of 1890, and to compel the production by the General Paper Company or other defendants, through their officers or otherwise, of said books, records, papers, reports and contracts for inspection and introduction as evidence would be contrary to the provisions of the fifth amendment to the Constitution of the United States.

Third. That the alleged acts of the General Paper Company and other defendants, which the complainant is endeavoring to establish, would, if committed by the General Paper Company, be violations of the laws of the state of Wisconsin and would subject the General Paper Company and other defendants above named to forfeiture of their charter and other penalties under said laws; and to compel it, through its officers or otherwise, to produce the books, records, papers, reports and contracts, would be to compel it to furnish evidence tending to establish that it has been guilty of such acts as would subject it to the forfeiture of its charter and other penalties that would be contrary to the provisions of the fourth and fifth amendments to the Constitution of the United States.

Fourth. That the purpose of the suit in the district of Minnesota, and the making of the request mentioned in the order to show cause, is to obtain a decree in enjoining the General Paper Company from carrying on its business for which it was incorporated, and to enjoin the General Paper Company from carrying out certain agreements and contracts existing between it and the other defendants on the ground that same were made in violation of the provisions of the act of Congress; that

said contracts and agreements are of great value to the General Paper Company and constitute practically its entire business, and are also of great value to the other defendants, and that to compel the production of said papers, books, records, reports and contracts for the purposes aforesaid would be contrary not only to the provisions of the fourth and fifth amendments to the Constitution, but also to the well established rule of the common law that no person will be compelled to discover any fact which may subject him to a forfeiture or penalty or anything in the nature of a forfeiture or penalty. (pr. rec. in 381, p. 85, *et seq.*)

The same reasons are then set forth respecting the answering of the questions which the witnesses here refused to answer.

The witness Whiting answered in substantially the same manner, alleging that he is first vice-president of the General Paper Company and the holder of thirty-five hundred dollars (\$3,500) par value of its stock, and as such vice-president, and not otherwise, was one of the custodians of the books, records, papers, reports and contracts mentioned in the order; that he is also the president of the Wisconsin River Paper and Pulp Company, one of the defendants, and the owner of its stock of the par value of over one hundred thousand dollars (\$100,000), and that the General Paper Company and the Wisconsin River Paper and Pulp Company objected and that he objected to the production of said books, records, papers, reports and contracts for inspection, giving substantially the same reasons as those given in the answer of Alexander why he should not be required to produce said papers and documents and required to answer said questions.

The witness Stuart answered that prior to July 1, 1905, he was the second vice-president of the General Paper Company, and as such second vice-president, and not otherwise, was one of the custodians of the books, records, papers, reports and contracts mentioned in the order; that the same are the papers or documents of the General Paper Company and not of the respondent, and that the General Paper Company objects to the production thereof, and said Stuart by his answer relies on the same ground of answer set up by Alexander.

The General Paper Company by permission of the court filed an answer setting up substantially the same reasons and defenses to the order to show cause.

The court ordered that the witnesses Alexander, Whiting and Stuart be directed to appear before the examiner and to answer each and every question put to them by counsel for the complainant, and to produce before the examiner at such time and place the books, records, papers, reports and contracts requiring of them respectively as more fully appears by said petition, for the purpose of examination for use in evidence by the complainant, and that the counsel should have the right at such time and place or any adjournment of any hearing before said examiner to inspect the books, records, papers, reports and contracts and introduce them or any of them in evidence of said cause.

From this order appeals were prayed by the witnesses Alexander, Whiting and Stuart and also by the General Paper Company, which appeals were allowed by the court and duly perfected.

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In the second group is the appeal of Harmon and the General Paper Company (No. 385).

In this case, a plain summons was issued for Harmon and others without any order of court and without any *duces tecum* provision.

Harmon appeared before the examiner and refused to answer certain questions and to produce certain papers.

Thereupon, the United States filed a petition for the purpose of requiring Harmon to show cause why he should not answer said questions, produce said papers, orders and acceptances and comply with the request made of him.

This petition, after reciting the nature of the principal case, and the pleadings and issues therein, and the appointment of the special examiner, states that at a hearing on July 7, 1905, the witness Harmon refused to answer certain questions and to produce certain papers, orders and acceptances as more particularly set forth in a schedule attached to said petition; that said questions are, as the petitioner believes, proper, competent and material to be answered and the request to produce said papers, orders and acceptances is proper, competent and material to be complied with in order that the material facts relating to the charge set out in the bill of complaint may be fully laid before the court. (pr. rec. in 385, p. 3, *et seq.*)

Attached to this petition are copies of the bill and answers. (p. 9, *et seq.*)

Thereupon, an order was entered requiring the witness Harmon to show cause why he should not answer the questions and produce the books and papers referred to. (p. 28.)

By his answer, he stated that he was a director of the General Paper Company and from January 1, 1901, to June 5, 1905, was president and manager of the Grand

Rapids Pulp & Paper Company; that the papers, orders and acceptances referred to in said petition and order to show cause are not and were not in his custody or under his control and that he had not then and has not the power to produce said papers, orders and acceptances. The answer of the witness further stated that he was a stockholder in the Centralia Pulp & Water Power Company, holding stock of the par value of sixteen thousand dollars (\$16,000); that the defendants, the Grand Rapids Pulp & Paper Company, the General Paper Company and the Centralia Pulp and Water Power Company and the respondent, each and all, have objected and do object to the production of said papers, orders and acceptances; that said objections are based upon the following reasons:

First. That the materiality of said papers, orders and acceptances has not been established so as to authorize a court of equity to order their inspection, production or introduction as evidence and that the same are not material, relevant or competent in said cause; that he ought not to be required to disclose any portions of said papers, orders and acceptances except on proper showing that the same are material and are not privileged for the protection of the defendants.

Second. That one of the purposes of the suit and of the request to produce said papers is to establish, and to compel the General Paper Company, Grand Rapids Pulp & Paper Company and the Centralia Pulp & Water Power Co. and the respondent as a director, officer and stockholder of said companies to furnish evidence tending to establish, that said companies have been guilty of a violation of the Act of Congress of 1890; that to compel the production of said papers would be contrary to the

fifth amendment to the Constitution and also contrary to the provision of the fourth amendment to the Constitution.

Third. That the alleged acts of the General Paper Company, Grand Rapids Pulp & Paper Company and the Centralia Pulp & Water Power Company complained of by said complainant, would, if committed by them, be violations of the laws of the state of Wisconsin and would subject said corporations to forfeiture of their charters and other penalties under said laws; that to compel either of said corporations, through its officers or otherwise, to produce said papers, orders and acceptances for inspection and introduction as evidence in said cause, would be to compel it to furnish evidence tending to establish that it has been guilty of such acts and to subject it to forfeiture of its charter, contrary to the fourth and fifth amendments aforesaid.

Fourth. That in addition to the matters above set forth, the purpose of said suit is to enjoin the General Paper Company from operating under the agency contracts and agreements existing between the said General Paper Company and other defendants on the ground that said contracts and agreements were made in violation of the said Act of Congress; that said contracts and agreements are of great value to the General Paper Company and upon which rests practically its entire business; they are also of great value to the other defendants; and such injunction would result in great injury, damage and loss to said corporations, and that to compel the production of said papers as evidence for the purposes aforesaid would be contrary, not only to the provisions of the fourth and fifth amendments, but also to the well-established rule of the common law, as well as of equity juris-

prudence, that no person shall be compelled to discover any facts, either by producing documents or answering questions, which may subject him to prosecution for crime, or to a forfeiture or penalty, or anything in the nature of a forfeiture or penalty. (pr. rec. in 385, p. 28, *et seq.*)

By leave of court, the General Paper Company filed an answer to said rule to show cause, setting up substantially the same reasons and defenses as those contained in the answer of the witness Harmon. (p. 35, *et seq.*)

The court entered an order directing Harmon to appear before the special examiner and to answer the questions put to him and to produce before the examiner the papers, orders and acceptances requested of him by counsel for the complainant as more particularly shown in said petition, and schedule thereto attached, for the purpose of examination and use as evidence. (pp. 39-40.)

From this order, the court allowed a joint appeal by Harmon and the General Paper Company which was duly perfected. (p. 47.)

(3)

In the third group is contained the writs of error of Nelson, Bossard and McNair, being Nos. 490, 491 and 492.

In these cases, a petition for writs of *subpoena duces tecum* was filed in the Circuit court for the district of Minnesota. This petition, after describing the original proceeding and pleadings and issues therein and showing the appointment of the special examiner and that a hearing before said examiner had been set to be held at St. Paul, Minnesota, on July 24, 1905, states as follows:

"Fourth. Your petitioner further states that, in

order to fully determine the nature and effect of said combination and conspiracy, referred to in the petition, and satisfactorily and by competent and material evidence to establish the truth of the averments of said petition in that regard, it is proper, material and necessary to have summoned before the said special examiner at the hearing above mentioned the following witnesses, and to have produced in evidence and laid before the court for its inspection the various papers, books and documents hereinafter particularly mentioned in the possession and under the control of said witnesses respectively." (pr. rec. in 490, pp. 6-7.)

"Sixth. Your petitioner further states that the books, contracts and papers hereinafter particularly designated and referred to contain evidence material and necessary to be laid before the court in order to establish the allegations of the petition or bill of complaint herein; and your petitioner states, *on information and belief*, that the said books, contracts and papers will, among other things, establish the fact that the prices and amounts realized by the defendants other than the defendant General Paper Company, upon various grades and kinds of paper by them manufactured, and sold by and through the defendant General Paper Company, are and have been, by and through the medium of the said defendant General Paper Company and pursuant and in furtherance of the conspiracy and combination in restraint of trade and commerce alleged in said petition or bill of complaint, equalized among the defendants manufacturing said grades and kinds of paper, and that the profits arising from the sale of such paper, over and above a certain uniform and arbitrary price placed thereon, have been likewise pursuant to and furtherance of said combination and conspiracy, distributed and apportioned among the said defendants other than the defendant General Paper Company." (pr. rec. in 490, p. 7.)

The petition then prays for writs of *subpoena duces tecum* against Nelson, individually and as president of the Hennepin Paper Company; McNair, individually and as general manager of the Northwest Paper Company, and Bossard, individually and as treasurer of the Itasca Paper Company; and asks that they be required to produce certain books, papers and documents.

In each instance the books and papers required to be produced are described in substantially the same language and it will therefore be sufficient to set out one of such demands as follows:

"First. The account books, including the journals, ledgers and other books kept by or under the control of the defendant Hennepin Paper Company or the said B. F. Nelson, president of the said Hennepin Paper Company—

"(A) Showing the amount and kinds or grades of paper manufactured by the said defendant Hennepin Paper Company, and sold by or through the defendant General Paper Company as the exclusive sales agent of the said defendant Hennepin Paper Company, since the 5th day of July, 1900, and also showing where the said paper so manufactured and sold has been shipped, since the 5th day of July, 1900;

"(B) Showing the prices, amounts or credits received for such paper from the defendant General Paper Company, between the 5th day of July, 1900, and the present time, including entries showing the manner in which the prices and amounts received or realized by the said defendant Hennepin Paper Company, for any or all of its products so sold by or through the defendant General Paper Company have been equalized with the prices and amount received or realized by any or all of the other defendant companies of which the defendant General Paper

Company is and has been the exclusive sales agent, for any and all of their products or for similar products, between the 5th day of July, 1900, and the present time;

“(C) Showing the amounts and proportions of the earnings or profits of the defendant General Paper Company received by the defendant Hennepin Paper Company, from or through the defendant General Paper Company either directly or indirectly, either in the form of dividends or in the form of rebates, credits or otherwise, between the 5th day of July, 1900, and the present time.

“Second. All contracts, agreements, writings and account books, including journals, ledgers and other books, kept by or under the control of the defendant Hennepin Paper Company or the said B. F. Nelson, president of the said defendant Hennepin Paper Company, showing the agreement, arrangement or understanding under and pursuant to which, and the manner in which, the prices and amounts realized by the said defendant Hennepin Paper Company, upon the various kinds and grades of paper manufactured by it, and sold by or through the defendant General Paper Company, are and have been, since the 5th day of July, 1900, equalized, or the profits arising from the sale of such paper distributed or apportioned, as between the said defendant Hennepin Paper Company and other defendants manufacturing and selling through the defendant General Paper Company similar kinds or grades of paper, or among all of the defendants manufacturing similar kinds or grades of paper.” (pr. rec. in 490, pp. 8-9.)

There is an affidavit to this petition, made by Frank B. Kellogg, special assistant to attorney general, and it is as follows:

“That he has read the foregoing petition, knows the contents thereof, and that the statements therein

contained, *except as to matters therein stated on information and belief, are true.*" (p. 11.)

It will be noted that paragraph six, above quoted, states as a mere conclusion of fact that the books, contracts and papers referred to, contain evidence material and necessary to be laid before the court in order to establish the allegations of the petition or bill of complaint and that all that follows these words is stated upon information and belief and that there is nothing in the affidavit which shows that the affiant even *believes* to be true that part of the petition which is so stated upon information and belief.

Upon this application, an *ex parte* order was entered directing the subpoenas to issue. (p. 32.)

The witnesses Nelson, Bossard and McNair appeared before the examiner, but declined to answer certain questions and to produce the books, records and papers described in the *subpoena*, and thereupon the United States filed its petition for an order to show cause why they should not be required so to do.

This petition, after reciting the original case and the issues therein and the appointment of the special examiner and a hearing had before him on July 24, 1905, and the service of the several writs of *subpoena duces tecum*, states that said witnesses had refused to answer certain questions and to produce the books, records and papers mentioned and described in said subpoena, and prays that they be directed to appear before the court and show cause why they should not answer such questions and produce such books, records and papers. (pr. rec. in 490, p. 39, *et seq.*)

Thereupon an order to show cause was entered by the court requiring said parties to appear and show cause

why they should not make answers to said questions and comply with the request for the productions of the books, records and papers described in the writs of subpoena. (pp. 53-54.)

In answer to this rule to show cause, each of the witnesses set up substantially the same matters and defenses and as their answers are alike except as to the name of the companies with which they are connected and in which they are interested, the answer of one will be sufficient to refer to herein.

By the answer of Nelson, he shows that he is a director in, and president of, the Hennepin Paper Company and a stockholder therein to the amount of forty-nine thousand dollars (\$49,000) par value, and that the books and papers referred to in the order to show cause are the books and papers of the Hennepin Paper Company, and not of the respondent, and are subject to the control of the Hennepin Paper Company, and not of the respondent; that he is also a director of the General Paper Company and owner of stock therein of the par value of twenty-two hundred and fifty dollars (\$2,250); that the Hennepin Paper Company and the General Paper Company have objected and do object and that he, the respondent, has objected and does object to the production of said books and papers for the inspection by counsel for complainant and such objections are based upon the following reasons:

First. That the materiality of said books and papers in the cause has not been established so as to authorize a court of equity to order their inspection, production and introduction in evidence and that the same are not material, relevant or competent evidence; that said books and papers contain matters of importance to the Henne-

pin Paper Company and the General Paper Company in no way bearing upon or touching the issues in this cause, which it would be highly injurious to the business interests of said companies to make public; that he ought not to be required to disclose any portions of said books and papers, except upon a proper showing that the same are material to the issues in said cause and are not privileged for the protection of the defendants above named.

Second. That one of the purposes of the complainant in instituting said cause and making the requests mentioned in said order to show cause is to establish and compel the Hennepin Paper Company and the General Paper Company and the respondent as director and officer of each thereof, to furnish the complainant with evidence tending to establish that said companies have been guilty of violations of the Act of Congress of 1890 and to subject said companies to penalties for such violations; and that to compel the production of the books and papers of said companies through their officers or otherwise, for inspection and introduction in evidence, would be contrary to the provisions of the fifth amendment to the Constitution and would also be contrary to the provisions of the fourth amendment to the Constitution.

Third. That the acts of the Hennepin Paper Company complained of in the original petition and which said complainant is endeavoring to establish, would, if committed by said Hennepin Paper Company, be violations of the laws of Minnesota and would subject said company to forfeiture of its charter and other penalties under said laws; that to compel said Hennepin Paper Company, through this respondent as one of its officers, or otherwise, to produce said books and papers for inspection and introduction in evidence, would be to compel it to furnish

evidence to establish that it had been guilty of such acts and subject it to a forfeiture of its charter and other penalties contrary to the provisions to the fourth and fifth amendments to the Constitution.

Fourth. In addition to the matters set forth, the purpose of the complainant in instituting said cause is to obtain a decree enjoining the said General Paper Company from carrying on the business for which it was incorporated and to enjoin the carrying out of certain contracts and agreements on the ground that said contracts and agreements are in violation of the provisions of the said Act of Congress; that said contracts and agreements are of great value, not only to the General Paper Company, whose entire business practically rests upon them, but of the Hennepin Paper Company and their annulment would result in great injury, damage and loss to said companies, and that to compel the production of said books and papers would be contrary not only to the provisions of the fourth and fifth amendments, but contrary to the well-established rule of common law, as well as of equity jurisprudence, that no person will be compelled to discover any fact, either by production of documents or answering questions which may subject him, either directly or eventually, to prosecution for a crime or to a forfeiture or penalty or anything in the nature of a forfeiture or penalty. (pr. rec. in 490, pp. 77, 78, 79.)

The same reasons are set up why the respondent should not be compelled to answer the interrogatories put to him.

The Hennepin Paper Company, Itasca Paper Company and the Northwest Paper Company also filed answers to said rule to show cause, all setting up substantially the same defenses and contentions.

The rule to show cause coming on to be heard, the court overruled contentions of plaintiffs in error and directed the witnesses to answer the questions and produce the books, records and documents referred to.

Thereupon the witnesses again appeared before the special examiner and refused to answer said questions and produce said documents.

Thereupon the United States filed its petition in said Circuit court, setting forth the various proceedings above mentioned and the refusal of the witnesses to obey the order to answer the questions and produce the books, records and documents referred to and an order was issued requiring the witnesses to show cause why they should not be punished for contempt of court.

Each of the witnesses answered the rule to show cause and in substantially the same manner; it will be necessary, therefore, only to quote one of the answers to show the purport thereof.

The witness Nelson answered that he is a director and president of Hennepin Paper Company, one of the defendants in the original cause, and is the owner and holder of stock in said Hennepin Paper Company of the par value of forty-nine thousand dollars (\$49,000) and that the books and papers referred to in said petition and in relation to which he is charged with contempt of court are the books and papers of the Hennepin Paper Company and not of the respondent and are subject to the control of the Hennepin Paper Company and not of the respondent.

That the respondent is also a director in the General Paper Company and a holder of stock therein to the amount of twenty-two hundred and fifty dollars (\$2,250).

That all the matters concerning which the questions

referred to in the petition were asked, and for refusing to answer which, the respondent is charged with contempt of court, came to the respondent's knowledge exclusively as president and director of the Hennepin Paper Company, or as a director of the General Paper Company, in the conduct of matters entrusted to him as such director or president, and which said companies, from the nature of the case, were compelled to entrust to him as such director or officer; that the Hennepin Paper Company and the General Paper Company have objected and do object and that the respondent has objected and does object to the production of said books and papers for inspection by counsel for said complainant for the purpose of being offered in evidence to said cause. And that said Hennepin Paper Company and General Paper Company have objected and do object, and the respondent has objected and does object, to said questions and to his being required to answer the same, for the reasons hereinafter set forth, and that upon advice of counsel respondent has refused to submit said books and papers or to answer said questions; said objections and refusals being based upon the following reasons:

First. That the materiality of said books and papers, and of the questions referred to, has not been established so as to authorize a court of equity to order their inspection, production and introduction in evidence and that the same are not material, relevant or competent evidence in said cause; that said books and papers contain, and said answers called for disclose, matters of importance to the business interests of said corporations in no way bearing upon the issues in this cause, and that he ought not to be required to disclose any portion of said books and papers, or to answer any of said questions, except on

a proper showing that the same are material to said cause to establish some issue therein and are not privileged for the protection of the defendants.

Second. That one of the purposes of the complainant in instituting said cause is to establish and compel said corporations and this respondent, as a director and officer thereof, to furnish said complainant evidence tending to establish that said corporations have been guilty of violations of the Act of Congress of 1890, and to subject said corporations to the penalties for such violations imposed by said act; and that to compel the production, through this respondent or otherwise, of the books and papers for inspection and introduction in evidence, or to compel said defendants, or either of them, through this respondent, to answer said questions would be contrary to the provisions of the fifth amendment to the Constitution, which provides that no person shall be compelled in any criminal case, to be a witness against himself; and also contrary to the provisions of the fourth amendment which provides that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated.

Third. That the alleged acts of the Hennepin Paper Company complained of in the original petition would, if committed, involve violations of the laws of Minnesota and would subject said Hennepin Paper Company to forfeiture of its charter and to fines and other penalties under said laws; that to compel said company, through this respondent, to produce said books and papers, would be to compel it to furnish evidence which would subject it to a forfeiture of its charter and would be contrary to the provisions of the fourth and fifth amendments to the Constitution.

Fourth. That in addition to the matter above set forth, the purpose of the complainant in instituting said cause, and demanding said books and papers, and asking said questions, is to obtain a decree enjoining the said Hennepin Paper Company from operating under certain contracts and agreements existing between it and the General Paper Company, on the alleged ground that said contracts and agreements are in violation to the act of Congress; that said contracts and agreements are of great value to both companies and that their annulment would result in injury, damage and loss to both companies; and that to compel the answers to said questions and the production of said books and papers for inspection and introduction in evidence, would be contrary not only to the provisions of the fourth and fifth amendments to the Constitution, but also contrary to the well established rule of common law, as well as to equity jurisprudence, that no person will be compelled to discover any fact, either by producing documents or answering questions which might subject him to prosecution for a crime, or to a penalty or a forfeiture or anything in the nature of a penalty or forfeiture.

Further answering, the respondent alleges that he ought not to be required to answer said questions or produce said books and papers for the following reasons:

First. The purpose thereof is to establish and compel the respondent to furnish evidence tending to establish that he has been guilty of certain violations of the act of Congress and subject him to a penalty for such violations, and that to compel him to answer such questions and produce, for the purpose of being offered in evidence, such books and papers, would be contrary to the provisions of the fourth and fifth amendments to the Constitution.

Second. That the alleged acts of said corporations complained of in the original petition would, if committed by the defendant companies, involve violations of the laws of Minnesota, by respondent and would subject him to fine and imprisonment, and other penalties under said laws; and that to compel him to answer said questions would be to compel him to furnish evidence tending to establish that he has been guilty of the violations of the laws of Minnesota and subject him to fine and imprisonment and other penalties, contrary to said amendments of the Constitution.

Third. That one of the purposes of the complainant in instituting said suit and seeking to secure said evidence is to establish and compel the respondent to furnish evidence tending to establish that which would result in subjecting him to loss or detriment in the nature of a penalty or forfeiture, in that the Hennepin Paper Company, of which he is a stockholder, would be subjected, under the laws of Minnesota, to fines and penalties, including the forfeiture of its charter, resulting in the virtual forfeiture of the stock of the respondent in said defendant company, and in the loss and forfeiture of his interest in the General Paper Company.

And further answering, the respondent says that he is advised and believes and so charges and avers that the order of this court entered on October 7th, 1905, requiring him to testify as set forth in said petition and to produce the books and papers therein described, is void for want of power and jurisdiction in said court to enter the same. (pr. rec., p. 62.)

The petition to show cause why the witnesses should not be punished for contempt was heard upon petition and answers thereto, filed by said witnesses, and upon

various evidences embodied in a bill of exceptions including the proceedings under the original petition, and thereupon the court overruled the objections and answers of the witnesses and ordered that they be severally adjudged guilty of contempt in having wilfully disobeyed the order of the court entered on the seventh day of October, 1905; and adjudged that they, and each of them, be severally assessed and fined in the sum of one hundred dollars (\$100) for said disobedience to said order, said fines to be paid to the clerk of this court for the use of the United States as a punishment for such contempt. (pr. rec., 74-75.)

And it was further ordered and adjudged that in addition to said fines, said witnesses, and each of them, be imprisoned in the county jail of Ramsey County, Minnesota, each until his said fine is paid and until he shall fully comply with the order entered on the seventh day of October, 1905.

Each of the witnesses sued out a writ of error and assigned errors upon the record, and, in each instance, the court entered an order making the writ of error a *supersedeas*.

It appears, therefore, from the record, that these cases come here in two forms.

1. The Wisconsin cases upon appeals duly prayed and allowed from an order requiring the witnesses to testify and produce books, records and papers.

2. The Minnesota cases by writs of error from an order adjudging the witnesses guilty of contempt of court for refusing to obey the order of court and punishing them by the imposition of a fine.

In the case of witness Harmon, in addition to all other questions, it appears that he never was served with a

subpoena requiring him to produce the books, papers and documents in question, but was simply asked to produce them whilst being examined as a witness brought to the stand upon a common or ordinary *subpoena*.

In each and every case, the witness denies under oath, his possession and control of the books and papers, and it is not shown in any or either case that it is within the power of the witness to comply with the order to produce such books and papers.

POINTS.

(1)

By the fourth amendment to the Constitution of the United States it is provided:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated."

By the fifth amendment it is provided as follows:

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law."

The first question that naturally arises is whether corporations are within the protection of these amendments, and, if so, the next question is whether the proceedings in this case are consistent with the privileges conferred by the amendments.

It has been held by this court that the protection of the fourteenth amendment extends over corporations. The language of that amendment is:

"Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In the case of the *Pembina Mining Company v. Pennsylvania*, 125 U. S., 181, the court says:

"The inhibition of the amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to pre-

vent any person or class of persons from being singled out as a special subject for discrimination and hostile legislation. *Under the designation of person there is no doubt that a private corporation is included.* Such corporations are merely associations of individuals united for a special purpose and permitted to do business under a particular name, and have a succession of members without dissolution." (pp. 188-9.)

In *Home Insurance Co. v. New York*, 134 U. S., 594, the court says:

"It is conceded that corporations are persons within the meaning of this (fourteenth) amendment."

In the case of the *Gulf, Colorado and Santa Fe R'y v. Ellis*, 165 U. S., 150, the court says:

"It is well settled that corporations are persons within the provision of the fourteenth amendment of the Constitution of the United States. (Citing cases.) The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can in respect to the individuals who are the equitable owners of the property belonging to such corporations."

We submit that if corporations are within the protection of the fourteenth amendment, there is no reason why they should not also be within the protection of the fourth and fifth amendments.

(2)

Are the proceedings in this case violative of the provisions of the fourth amendment to the effect that the people shall be secure in their persons, houses, papers and effects against unreasonable searches and seizures?

That improperly forcing of a person to produce his books and papers in court is a seizure of such books and papers, seems to be settled by the case of *Boyd v. United States*, 116 U. S., 616.

In that case this court said:

"Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible or compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other."

In this case the government seeks to search for and seize the papers of the corporations interested in the litigation by compelling the officers of these corporations in violation of their duties as officers, and in defiance of the commands of their principals, to remove from their place of deposit and bring into court the private papers, records, books and effects of the corporations.

That this is a seizure there can be no doubt; the only question is, is it an unreasonable seizure?

The power of *courts of law* to require a litigant to produce his books and papers to be used against him in trials at law is derived from Sec. 724 of the Revised Statutes, and is as follows:

"In the trial of actions at law the courts of the United States may on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery."

In commenting upon this statute this court in *Boyd v. United States*, stated:

"The restriction of this proceeding to 'cases and under circumstances where they (the parties) might be compelled to produce the same (books or writings) by the ordinary rules of proceeding in chancery,' shows the wisdom of the congress of 1789. The court of chancery had for generations been weighing and balancing the rules to be observed in granting discovery on bills filed for that purpose, in the endeavor to fix upon such as would best secure the ends of justice. To go beyond the point to which that court had gone may well have been thought hazardous. Now it is elementary knowledge, that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to *forfeit his property*. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to *forfeit his property*, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power but it cannot abide the pure atmosphere of political liberty and personal freedom." (pp. 631 and 632.)

The power of the court of chancery to compel the production of books, papers, records, etc., is regulated by the common law pertaining to bills of discovery, and is unquestionably subject to the following rules and limitations:

1. There can be no compulsory discovery of the books and papers of another unless there is first a preliminary showing that they contain matters material and relevant to the issue.

2. There can be no enforced discovery if the effect may be to subject the party who is called upon to produce the books and papers to a penalty of forfeiture, or anything in the nature of a penalty or forfeiture.

In this case there was no proof that any of the books and papers called for would furnish competent and relevant evidence in the case.

In the first group of cases, the allegation under which the *subpoenas duces tecum* were obtained was as we have seen that to fully determine the nature and effect of the alleged combination and conspiracy and to establish the truth of the averments of the petition, it was proper, material and necessary to have summoned before the special examiner certain named witnesses and have produced in evidence and laid before the court for inspection, the papers, books and documents thereafter particularly mentioned.

This allegation was a mere conclusion of the pleader, and is not even supported by proper affidavit.

In the same case, in the second petition for a *subpoena*, the allegation was that the General Paper Company had entered into certain contracts with newspapers for the purchase of news print, and that said contracts were competent and material evidence.

This statement is also a mere conclusion, and is not supported by any proof.

In the *Harmon* case, no application was made to the court for *subpoena duces tecum*, and the witness was simply asked while on the witness-stand, and without any previous showing, to produce certain books and papers.

In the third group of cases, Nelson and others, the application for the writ alleged that the books, contracts and papers, thereafter particularly designated and re-

ferred to, contained evidence material and necessary to be laid before the court in order to establish the allegation of the petition.

It is further stated upon "information and belief" that said books, papers and contracts will, among other things, establish the fact that the prices and amounts realized by the defendants have been equalized among the defendants, and that the profits arising from the sale of paper, over and above a certain uniform and arbitrary price, have been distributed and apportioned among the defendants.

This petition is sworn to, but the affiant, in so doing, expressly excepts matters stated upon "information and belief" and does not even declare a belief in such statements.

There is not a single allegation, nor is there any proof as to the contents of the books and papers called for. It is manifest that the entire object and purpose of compelling their production is to enable counsel for the government to inspect and read them for the purpose of ascertaining whether or not there is anything in their contents which would help his case. In other words the government asks that it be given a free license to learn the contents of every book, paper and document in the possession of the corporations, to inspect all of their business transactions, to scrutinize every dealing which they have ever had with any of their customers, to enter into their innermost business affairs, and all for the purpose of ascertaining whether or not it can thereby discover something which it may regard as of sufficient importance to offer in evidence.

The general statements in the petitions, such as that in order to fully determine the nature and effect of the

alleged combination and conspiracy and establish the truth of the averments of the petitions, it is proper to have produced in evidence and laid before the court for inspection, various books, papers and documents, amount to nothing. This is not an allegation that any evidence which would tend to support the allegation to the bill, are contained in the books.

The allegation in the Minnesota case that the books, contracts and papers designated contain evidence material and necessary to be laid before the court in order to establish the allegation of the petitions, is no better.

There should be a showing that the books and papers contain some specific and detailed facts from which the court can see that they would be material; the allegation of the pleader that they contain evidence material and necessary does not enable the court to determine whether it is proper to direct the writ to issue.

In these cases there was no showing either in the petitions upon which the writs were issued, or otherwise, that the contents of the books and papers were such as to entitle the petitioner to read them in evidence.

It must be remembered that this is an action in which the final judgment of the court is invoked, and in which a final decree may be entered and not a mere inquiry or investigation, as was the case in *Interstate Commerce Commission v. Baird*, 194 U. S., 25, and in *Brown v. Walker*, 161 U. S., 591.

In the *Baird* case (p. 43), the court calls attention to this distinction.

A merely inquisitorial body is not governed by the same rules of evidence as those which pertain in trials between litigants in courts of law and equity.

In the second place, the only object and purpose in ex-

torting the testimony sought to be obtained is to lay the foundation for a decree which in itself necessarily works a forfeiture and imposes a penalty, or something in the nature of a forfeiture or penalty.

There can be no object in obtaining the testimony, except for the purpose of getting a decree as prayed by the bill which would include the forfeiture of valuable contract rights.

It is no answer to this to say that if the contracts attacked by the bill are unlawful it imposes no penalty or forfeiture to enjoin their performance; it might equally well be said that if a burglar is guilty it is no hardship upon him to make him prove his own guilt. The test is not whether the party is guilty or not, but whether the tendency of the evidence would be to show guilt and thereby subject him to a penalty or forfeiture.

The very purpose and object of the suit and of the testimony sought to be elicited in support thereof being to impose a penalty and enforce a forfeiture, immunity is impossible, unless it be said that the effect of giving the testimony would be to defeat the suit, and if that were so, no court would go through the absurd performance of compelling the production of testimony which would have such effect.

In addition to the penalty and forfeiture which would necessarily result from a decree, the corporations under the Sherman Act would become subject to other heavy pains and penalties. They would be subject to heavy fines, and under the sixth section any of their property, whilst in course of transportation from one state to another, might be seized and condemned and forfeited to the United States. They would also be subject to civil actions at the suit of persons with whom they had

dealt, and in such actions triple damages might be recovered as provided by section seven.

Claims under section seven, if any have accrued, belong to third persons who have a vested right therein which Congress is powerless to divest.

Moreover under the statutes of both Wisconsin and Minnesota the corporations interested in these appeals and writs of error, if found guilty of matters charged in bill of complaint, are liable not only to large penalties by way of fines and forfeitures, but are also liable to be deprived of their charters and franchises.

We submit, therefore, and under the well established rules of the common law, it would be an unreasonable search and seizure of the books and papers of these corporations to compel their production in evidence, for the reason that they are not shown to contain matters relative to the issues in the case, and for the additional reason that if relevant and competent, their production might result in the infliction of heavy pains and penalties.

It is therefore submitted that what is sought to be accomplished in this case is of itself an unreasonable search and seizure within the inhibition of the fourth amendment.

(3)

It would seem to be equally clear that the effect of the judgment below, if sustained by this court, is to compel the corporation to be a witness against itself in a proceeding which is of a criminal nature and thereby to deprive it of its property without due process of law.

It will be argued on behalf of the government that the witness is protected by the immunity statute of 1903, and that the witness cannot set up the privilege of the corporation.

Assuming for the moment that the witness is sufficiently protected by the immunity act, let us look at the other question:

Ordinarily it is, of course, true that the witness cannot set up as a reason for refusing to testify that thereby the privilege of another will be violated.

In these cases, however, the witnesses are required to testify in relation to matters of which they have no knowledge, except as officers and confidential representatives of the companies which they represent, and they are further called upon to produce books and papers belonging not to themselves but to corporations, and over which they have no personal control, and against the will of the corporations to remove such books and records from its custody and place them in the possession of the examiner and counsel for the government.

Unless, in cases of this character, the witnesses can refuse to produce the books of the corporation, then it is manifest that the corporation cannot under any circumstance have protection against the invasion of its records, because in any case any litigant can compel an officer of the corporation to bring its books into court without regard to the results which may ensue.

A witness who is an officer of a corporation and who is called upon to testify merely by reason of the fact that he is such officer and is called upon to produce books and papers which belong to the corporation and over which he has physical control (if at all) purely and simply by virtue of his office, is differently situated from the ordinary witness; he and his corporation are one; he is not only a part of the corporation, but for many purposes he is the corporation itself. It should not only be his right, but his duty to interpose the objection, to assert the privilege

of the corporation and to protect its papers and records against improper inspection.

If the officer of the corporation can be compelled to produce the books, records and papers of the corporation in a proceeding against it which is of a criminal nature, then, in effect, the corporation can be compelled to be a witness against itself.

(4)

The so-called Immunity Act of 1903, is in the form of a proviso engrafted upon an appropriation for the purpose of employing special counsel to conduct proceedings under the Inter-State Commerce and Anti-Trust Acts, and is as follows:

"Provided that no person shall be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter or thing concerning which he may testify or produce evidence in any proceeding, suit or prosecution under said acts."

A somewhat similar provision contained in the Act of 1893, but relating to proceedings before the Inter-State Commerce Commission, was considered by this court in

Brown v. Walker, 161 U. S., 591.

In that case the court held that the act granted an immunity as broad as the constitutional privilege, and, therefore, deprived the witness of the right to refuse to testify.

That was a case in which the witness had been adjudged in contempt for refusing to testify before a grand jury to transactions which tended to show that he had been guilty of infractions of the Inter-State Commerce Act.

No question was raised in the case of *Brozen v. Walker* as to the effect of the testimony on any corporation of which the witness was an officer or agent.

The question presented in that case was simply whether the witness might subject *himself* to a criminal prosecution by producing the papers demanded of him.

The act does not purport to give immunity to the corporation of which the witness is an officer and which he represents; it offers immunity to no one except the witness himself.

The corporations in question, as we have already shown, might by the testimony of the witnesses be incriminated and subjected to severe fines and penalties under the Sherman Act. They might become liable for heavy fines, and their property in process of transportation become subject to seizure and forfeiture. Against this the Act of 1903 does not attempt or profess to indemnify corporations.

Assuming that it does grant immunity to the individual witness for any personal acts which he may have done in violation of the law, still in cases like the present, the rights and interests of the corporations are so bound up in those of the witnesses that there can be no complete immunity as long as the corporations are left subject to prosecution.

Under the laws of both Wisconsin and Minnesota the witnesses are liable, if guilty of the acts complained, to fines and imprisonment. In addition to this under the laws of both states, the corporations, if guilty of the acts complained of, are subject not only to fines and penalties, but as well may be deprived of their charters and franchises.

There is no attempt on the part of congress to grant to

the corporations immunity from, or protect them against such a result, but even if there were, unquestionably congress has no power to prevent a state from revoking or annulling, for misuser, a charter or franchise granted by such state to the corporation.

We are not unmindful of what this court has said in the case of *Brown v. Walker*, as to the effect upon state prosecutions, but we submit that the court did not intend to be understood as saying that if the testimony, in addition to its effect upon the pending suit, necessarily showed a violation of a separate and independent state statute, the state would become powerless to enforce such statute.

Conceding that the immunity goes to the extent that the state cannot punish for the same offense, still the violation of the state statute is a separate and independent offense.

It is well settled that the same act may constitute an offense against two different sovereignties. The acts complained of might be in violation of the act of congress, and also of the statutes of the state in which the act was committed.

We do not apprehend that this court intended, in *Brown v. Walker*, to hold that the giving of testimony in the United States court gave immunity from punishment for the violation of a state statute creating a separate and distinct criminal offense.

If by the same act the National Laws regarding Inter-State Commerce were violated and the State Laws regulating Intra-State Commerce were violated, the guilty party could be reached and punished by both sovereigns, although the violation of both laws consisted of the same act or series of acts.

Congress has no power over Intra-State Commerce; no power to prescribe regulations regarding same; no power to punish the violation of state regulations regarding same, and it would seem, as a necessary consequence, no power to pardon violations of state regulations thereof.

It would seem at any rate that beyond any question that the state can decree, as one of the punishments to be inflicted for violation of its laws, that the charter of the offending corporation shall be vacated and the corporation dissolved. Congress has no power to stay any such proceeding.

This court will be respectfully asked to review, and at least narrow and limit, what was said in *Broken v. Walker* regarding the effect of the immunity act upon state prosecutions.

The appellants and plaintiffs in error ask that the order of the Circuit Court in the Eastern District of Wisconsin and the judgments of the Circuit Court for the District of Minnesota be each and all reversed.

Respectfully submitted.

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Of Counsel for Appellants.

